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No. ..-...

IN THE

Supreme Court of the United States

October Term, 1982

ALICE MADELEINE LABORDE,

Petitioner,

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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The Questions Presented for Review.

1. When a Title VII plaintiff has proved a *prima facie* case, can the employer rebut it without introducing evidence that its action had been based on a non-discriminatory reason? (If the employer can do that, it will seriously weaken enforcement of Title VII.)

In the case at bench uncontradicted evidence showed that the University's practice, when it considered a person for promotion to full professor, was (a) that evaluations of the person's work and recommendations as to promotion be made by specified individuals and bodies; (b) that such evaluations and recommendations, when completed, be delivered to the Chancellor; (c) the Chancellor then makes the University's final decision as to whether or not the person be promoted.

The record shows (i) the Chancellor did not testify; (ii) the evaluations and recommendations which were before him at the times he denied petitioner's promotion to full professor were not introduced into evidence; (iii) the Court of Appeals affirmed a judgment in favor of the University.

2. Is it sufficient, as held by the Fifth Circuit (*Jepsen v. Florida Board of Regents*, 610 F.2d 1379, 1381 (1980) that a Title VII plaintiff prove by a "preponderance of the evidence" that the employer's stated non-discriminatory reason was a "pretext" or, as held by the Ninth Circuit in the case at bench, must the Title VII plaintiff, to prove "pretext," carry the burden of proving that the employer's stated reason was "unreasonable?" (The Ninth Circuit's holding weakens enforcement of Title VII by increasing the Title VII plaintiff's burden of proof.)

The meaning of "unreasonable," as used in the case at bench, is shown by the trial Court's Finding X which stated:

> "I cannot say the University's determination that Professor Laborde's scholarship as inadequate was *unreasonable*. This court is reluctant to substitute its judgment for the academic experts in the field, *no matter how impressive her scholarly work appears to the court*." (Emphasis ours. If that is the law, how can a Title VII plaintiff *ever* prove pretext against a University?)

3. Is it erroneous, as held by the Fifth Circuit (*Jepsen v. Florida Board of Regents*, 610 F.2d 1379, 1383 (Footnote 2) (1980) for the trial court, in deciding the issue of pretext, to give "deference" to the University's stated nondiscriminatory reason, or, is it proper to do so, as held by the Ninth Circuit in the case at bench? (The Ninth Circuit's holding weakens enforcement of Title VII by increasing the Title VII plaintiff's burden of proof).

4. Is a Title VII plaintiff entitled to access to the defendant University's records on which its challenged decisions purportedly rest, when the University claims its evaluations of plaintiff's scholarly work are bases for its refusals to promote plaintiff?

The Fourth Circuit (*Keyes v. Lenoir Rhyne College*, 552 F.2d 579, 581, cert. den. 434 U.S. 91) (1977) and Fifth Circuit (*Jepsen v. Florida Board of Regents*, 610 F.2d 1379, 1384-1385) (1980) upheld such right of access. Petitioner, in the case at bench, was denied such access. (The Ninth Circuit's decision, by denying a Title VII plaintiff access to such crucial evidence weakens enforcement of Title VII).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Opinions Below.

The first opinion of the Court of Appeals, April 22, 1982, (Appendix A, *infra*) is reported at 674 F.2d 1323-1327 (withdrawn from bound volume). The final opinion of the Court of Appeals, as modified September 3, 1982 (Appendix B, *infra*) is reported at 686 F.2d 715-719. The September 7, 1982 order denying petitioner's Petition for Rehearing as to the first opinion and suggestion for rehearing *en banc*, and dissenting opinion (Appendix C, *infra*) is reported at 686 F.2d 719-720. The order construing the petitioner's September 17, 1982 Petition for Rehearing as to the Modified Opinion as a Motion for Reconsideration, and denying such motion (Appendix D, *infra*) is not reported.

Jurisdiction.

The Judgment of the Court of Appeals was entered on April 22, 1982 and modified on September 3, 1982. On September 7, 1982 the petitioner's timely Petition for Rehearing and suggestion for rehearing *en banc*, as to the April 22, 1982 opinion was denied. On October 18, 1982 petitioner's timely Petition for Rehearing as to the Court of Appeals' September 3, 1982 Modified Opinion and suggestion for rehearing *en banc* was construed as a Petition for Reconsideration and denied. This Petition for Certiorari is filed within 90 days of September 7, 1982. This Court's jurisdiction is invoked under 28 United States Code Sec. 1254(1).

Statute Involved.

42 U.S.C. Sec. 2000e-2(a)(1) states:

> "(a) It shall be an unlawful employment practice for an employer
>
> (i) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

Statement of the Case.

Alice Madeleine Laborde, (Laborde) an associate professor since 1974, sued the Regents of the University of California (the University) under Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.). Her complaint (C.R. 1)[1] alleged that the University had had a long

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[1] "C.R.," "R.T.," and "Ex" refer, respectively, to the Clerk's Record, Reporter's Transcript, and Exhibits, of the trial court proceedings filed in the Court of Appeals.

standing practice of unlawful employment discrimination on the basis of sex and national origin; as part of such practice the University, commencing in 1974, had refused to promote her to full professor.

The University's answer (C.R. 14) denied unlawful discrimination. At the trial it claimed it had denied Laborde promotion because it considered her scholarship inadequate. (Finding X, C.R. 49).

At the trial Laborde introduced statistical and other evidence which proved, among other things, a *prima facie* case of sex discrimination. (Conclusion of Law 6, C.R. 49).[2] Laborde also introduced evidence which, the court found, showed that a majority of the outside scholars, whom the University had engaged to evaluate Laborde's work, had recommended, in 1978-1979, that Laborde be promoted to full professor. (Finding IX, C.R. 49). The actual majority for Laborde's promotion was 7 to 1.[3]

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[2] "The statistical evidence presented here establishes a *prima facie* case. The evidence established a shortage of women with respect to the numbers on the faculty, academic rank, promotion to tenure, and salaries . . . . in the light of these statistics it would appear that the employment policies followed by the University may unwittingly achieve an unlawful discriminatory result."

(Conclusion of Law 6, C.R. 49) Uncontradicted evidence showed, among other things, that from the founding of the Irvine campus in 1966, until 1977-1978, a total of 101 persons had been promoted to full professor; 99 were men, 2 were women. (Ex. 40, in evidence R.T. 187).

[3] Laborde testified that her Department Chairman had given her copies of such 8 evaluations, with the evaluators' names deleted. The University did not object to their introduction into evidence. (R.T. 110-117). Excerpts, clearly showing such 7 to 1 majority for Laborde, are as follows:

"Ex. 82. 'Certainly there are many full professors in excellent universities in this country who have not accomplished half as much as Prof. Laborde.'

Ex. 83. '. . . . the range and quality of her various studies would make her very suitable for promotion to a full professorship.'

Ex. 84. '. . . . Mrs. Laborde proves to have a real mastery . . . which has given her, on the international scene, a well deserved reputation as a scholar.'

(footnote continued on following page)

At the trial the University did not offer any testimony by a scholar in Laborde's field (18th Century French Literature) as to the quality of Laborde's scholarship. Instead it introduced evidence that it had a "process" whereby the qualifications of a person being considered for promotion to full professor were reviewed by various bodies and officials; that such process provided that the records of such reviews, and the recommendations of the reviewers, be forwarded to the Chancellor; the Chancellor then decided whether or not the person should be promoted.[4]

Executive Vice Chancellor McGaugh described the University's rules for promotion to full professor. He expressed the opinion that they were fair and protected those seeking promotion. He testified that the "process of review" for Laborde was conducted in accordance with the University's rules. The trial court overruled Laborde's lawyer's objection that

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Ex. 86. 'Her activity as a scholar seems important to me and the problems she raises are often new. . . . I would give great confidence to Mrs. Laborde.'

Ex. 88. 'It is my opinion that she deserves promotion to full professor.'

Ex. 89. 'Professor Laborde's most recent text *Diderot et l'Amour*, is more derivative than her earlier monographs, but I do not see this as reasons for refusing such promotion.'

Ex. 90. This reviewer did not recommend promotion.

Ex. 91. 'Alice Laborde's exceptional attainments and promise for continued growth as a scholar and critic should eminently qualify her for promotion to Full Professor.' "

[4]Executive Vice Chancellor James T. McGaugh testified (uncontradicted)

". . . . the decision of the chancellor . . . is completely crucial" (R.T. 255) ". . . . [If] the chancellor takes a view which is [contrary to a recommendation] the chancellor is obligated to communicate that difference so that they have an opportunity to provide additional information before the chancellor makes a final decision." (R.T. 261-262).

> "The record is not in evidence [it] is the best evidence of this. We have no independent way of finding out if this is in fact true or not, totally hearsay." (R.T. 241).

The Chancellor did not testify. The University did not introduce any *evidence* of the Chancellor's reasons for denying Laborde promotion to full professor. The papers and recommendations which were before the Chancellor, at the times he denied Laborde promotion to full professor, were not introduced into evidence.

The judicial record, in the case at bench, accordingly, does *not* show the *Chancellor's* reasons, or lack of reasons, for his refusals to promote Laborde to full professor. The District Court's Findings and Conclusions that the University's refusals to promote Laborde were because it considered her scholarship inadequate are, therefore, unsupported by the record.

Finding X (C.R. 49) that

> "the collective academic judgment of the University that plaintiff lacked . . . . excellence in research and scholarship"

is likewise unsupported by the record, for an additional reason. Because the records before the Chancellor at the times he refused to promote Laborde to full professor are not in evidence, the judicial record does not show whether the Chancellor's refusals agreed with the recommendations before him or whether he decided contrary to the recommendations, after having afforded an opportunity to those making the recommendations to present additional evidence. (See footnote 4, page 4, *supra*).

ARGUMENT.

1. The University Did Not Rebut Laborde's Prima Facie Case. It Did Not Introduce Evidence That It Denied Laborde's Promotions for a Legitimate Non-Discriminatory Reason.

(a) Because (i) the Chancellor did not testify and (ii) the records which were before him at the times he denied Laborde promotion to full professor were not introduced into evidence, there is *no* evidence in the record that the Chancellor's decisions, denying Laborde promotion to full professor were based on legitimate, non-discriminatory reasons.

(b) The Court of Appeals' Modified Opinion (Appendix B, *infra*) was erroneous when it argued that the University had rebutted Laborde's *prima facie* case

> ". . . . by offering evidence that Laborde was repeatedly denied promotion to full professor because she failed to meet the University's standards for scholarship and research." (Appendix p. 12).

Such argument erroneously ignores the following material facts. (i) As set out on page 3, *supra*, Laborde's complaint (C.R. 1) alleged that sex discrimination was the University's *actual* reason for such denials. (ii) The trial court's finding that Laborde had proved a *prima facie* case, being unlimited, applied to the earlier denials of promotion as well as to the later ones; (iii) the Chancellor did not testify as to his reasons for such denials; (iv) the records before the Chancellor at the times he made such denials are not in evidence; (v) there is, accordingly, *no* evidence in the record that the Chancellor's earlier denials of Laborde's promotion were, in fact, based on a conclusion that her scholarship was inadequate.

(c) The law is settled that a *prima facie* case can be rebutted *only* by evidence.

"An articulation not admitted into evidence will not suffice. Thus, the defendant cannot meet its burden merely through an answer to the complaint or by an argument of counsel." (*Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 255 footnote 9 (1981)).

2. The Conflict Between the Fifth Circuit's Holding That a Title VII Plaintiff Can Prove "Pretext" by a "Preponderance of the Evidence" and the Ninth Circuit's Holding, in the Case at Bench, That She Must Prove the Employer's Stated Reason to Be "Unreasonable" Should Be Resolved in Favor of the Fifth Circuit's Holding.

(a) In *Jepsen v. Florida Board of Regents*, 610 F.2d 1379 (1980), the Fifth Circuit Court of Appeals, in reversing a judgment in favor of a university held:

> "*Board of Trustees v. Sweeney*, 439 U.S. at 24-25 . . . . expressly sanctioned the use of the *McDonnell Douglas* standards in Title VII cases against universities. . . . By requiring that Dr. Jepsen prove 'an abuse of discretion' the district court has placed on her a much greater burden than that approved by the Supreme Court as applicable to Title VII cases." (610 F.2d at 1382-83).

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) confirms with approval, that *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-804 (1973) holds that a Title VII plaintiff may prove pretext "by a preponderance of the evidence." (450 U.S. p. 253).

(b) In the case at bench, however, the district court by requiring Laborde to prove the University's claim as "unreasonable" placed on her a much greater burden than the "preponderance of the evidence" standard approved by this Court as applicable to Title VII cases. What the district

court meant by "unreasonable" is made clear by its Finding X (C.R. 49):

> "I cannot say that the University's determination that Professor Laborde's scholarship as inadequate was *unreasonable*. This Court is reluctant to substitute its judgment for the academic experts in the field, *no matter how impressive her scholarly work appears to the Court.*" (Emphasis ours).

This clearly means that that court will *never* find a university's claim that a woman's scholarship was defective to be a pretext "no matter how impressive her scholarly work appears to the Court."

(c) The Court of Appeals, in affirming the judgment based on such basic finding, misstated such finding, in crucial particulars, adverse to Laborde.

(i) The opinions ignored the fact that Finding X (C.R. 49) found that Laborde had not proved the University's determination concerning Laborde's scholarship was "unreasonable." Instead the opinion made the material misstatements that the district court had found "that the University could reasonably have decided. . . ." (Appendix p. 6) ". . . . the University reasonably decided. . . ." (Appendix p. 14).

(ii) The opinions omitted Finding X's (C.R. 49) crucial statement that its finding adverse to Laborde was *not* based on a judicial evaluation of the evidence; they ignored the statement that

> "This court is reluctant to substitute its judgment for the academic experts in the field, no matter how impressive [Laborde's] scholarly work appears to the court."

This omission creates an erroneous innuendo that the district court had made a judicial evaluation of the evidence.

(d) Despite the foregoing misstatements and material omissions, adverse to Laborde, in the Court of Appeals' opinions (Appendix A and B, *infra*) it is evident that the district court in *Laborde*, as the district court in *Jepsen*, erroneously placed on the woman faculty member a much greater burden, in her efforts to prove pretext, than that approved by the Supreme Court as applicable to Title VII cases. For the reasons set forth above the conflict between *Jepsen* and *Laborde* should be settled in favor of the holding in *Jepsen*.

3. The Conflict Between the Fifth Circuit Holding in *Jepsen v. Florida Board of Regents* (610 F.2d 1379, 1383 (Footnote 2) 1980) That It Is "Erroneous" for a Trial Court to Give "Deference" to a University's Stated Non-Discriminatory Reason for Its Action and the Holding by the Ninth Circuit, in the Case at Bench, That It Is Proper to Do So, Should Be Settled in Favor of the Fifth Circuit's Holding. If the Ninth Circuit's Holding Is Permitted to Stand, It Will Weaken Enforcement of Title VII by Making It More Difficult for a Plaintiff to Prove Pretext.

(a) *Jepsen* took the position that "deference" to the university's stated reason was contrary to the *McDonnell Douglas* standard for proving pretext. It stated

> "Prior to the *Sweeney* decision, some courts had expressed an attitude of "deference" to the decisions of universities in hiring and promotion matters, even in Title VII suits. . . ."

After reviewing authorities it concluded that "deference" was erroneous and that "the *McDonnell Douglas* standard is the appropriate standard to be used." (650 F.2d at p. 1383 footnote 2).

(b) The *Jepsen* position against deference is consistent with this Court's later decision in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). In discussing the factors involved in proving "pretext" the court stated:

> ". . . . we are unpersuaded that the plaintiff will find it particularly difficult to prove that a proffered explanation lacking a factual basis is a pretext." (450 U.S. at p. 258).

If, however, the trial court gives "deference" to a university's proferred explanation, it *will be* particularly difficult to prove pretext. The concept of "deference" necessarily implies that the plaintiff prove pretext by more than a preponderance of the evidence. Such requirement will weaken enforcement of Title VII. It is contrary to *Jepsen*, *McDonnell Douglas* and *Burdine*.

(c) In the case at bench the district court, in concluding that Laborde had not proved "pretext" stated:

> ". . . the Court . . . . must give cautioned deference to the judgment of faculty members." (Conclusion of Law 6, C.R. 49).

(d) Although the Court of Appeals' Opinions do not specifically comment on the district court's action in granting "deference" to the University's decision, they upheld a judgment based on such deference.

If such improper action — deference — is allowed to continue it will seriously weaken enforcement of Title VII.

4. The Ninth Circuit's Decision, in the Case at Bench, Denied Laborde Access to the University's Records on Which Its Refusals to Promote Her to Full Professor Were Purportedly Based. Such Decision Conflicts With Decisions in the Fourth Circuit (*Keyes v. Lenoir Rhyne College*, 552 F.2d 579, 581 Cert. Den. 434 U.S. 91 (1977) and the Fifth Circuit (*Jepsen v. Florida Board of Regents*, 610 F.2d 1379, 1384-1385 (1980)) Which Upheld Such Right of Access. The Conflict Should Be Resolved in Favor of the Decisions of the Fourth and Fifth Circuits. The Ninth Circuit's Decision, by Denying a Title VII Plaintiff Access to Crucial Evidence, Weakens Enforcement of Title VII.

(a) *Jepsen* stated:

"In *Keyes v. Lenoir Rhyne College* . . . . The Court [of Appeals] stated that 'if the College had sought to justify any male-female disparity on the basis of these evaluations the plaintiff should have been granted the opportunity to use them to demonstrate that the explanation was pretextual'. . . . We find this reasoning to be persuasive where, as here, the University defends a claim of discrimination on the ground that promotional decisions were based solely on unbiased faculty evaluations which involved criteria unrelated to sex.

The district court was correct, of course, in its desire to protect the confidentiality of these records. We *hold*, however, that the plaintiff should have been allowed to introduce these records into evidence. Any danger that the confidentiality of these records will be violated may be prevented by the entry of further protective orders. Reversed and remanded." (610 F.2d at pp. 1384-1385, emphasis ours).

(b) *Jepsen's* holding is consistent with the principles set forth in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981) and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

(i) *Burdine*, in reliance on *McDonnell Douglas*, stated: "Third, should the defendant carry this burden [of articulating a legitimate non-discriminatory reason for its action] the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons but were a pretext for discrimination." (480 U.S. at p. 253).

(ii) *Burdine* further stated:

". . . . we are unpersuaded that the plaintiff will find it particularly difficult to prove that a proferred explanation lacking a factual basis is a pretext." (480 U.S. at p. 258).

(c) Because (i) the employer need *merely articulate* a legitimate non-discriminatory reason for its action to rebut a *prima facie* case and (ii) the burden of proof is on the Title VII plaintiff to prove that the articulated reason is a pretext, common fairness and the transcendent legislative policy expressed by Title VII, *require* that the Title VII plaintiff be granted access to *all* the employer's records which are relevant to the reason which the employer articulated to rebut the *prima facie* case.

(d) The Court of Appeals, in the case at bench, erroneously upheld the district court's denial as "untimely" Laborde's motion to inspect the University's records.

The circumstances from which the "untimely" claim arose are as follows: Laborde's notice of motion for an order that she could inspect such records (C.R. 35) was filed 7 days after District Judge David W. Williams, who had been the presiding judge in the case at bench, transferred the case

to another judge. (C.R. 34). Laborde's motion recited that District Judge Williams was also the presiding judge in the case of *Therese Ballet Lynn v. The Regents of the University of California* [the case which later was reversed by the Court of Appeals, 656 F.2d 1337 (1981)]; that Lynn and Laborde had the same counsel; that Laborde's counsel, while acting for Lynn, had twice moved, in the *Lynn* case, for inspection of the University's records; that Judge Williams had twice denied inspection; that counsel regarded the factual and legal issues respecting inspection to be identical in both cases; they considered it to be a waste of judicial and legal time to make a similar inspection motion before Judge Williams on behalf of Laborde. (Laborde's inspection motion was filed 7 days after Judge Williams transferred Laborde's case to another judge.)

When the inspection motion was heard the University's counsel (i) did *not* claim that the delay in making the motion had prejudiced the University; (ii) stated that he had the requested records with him (R.T. 16) and proposed that the court review the records *in camera* to see if they show "discrimination" (R.T. 10); (iii) when Laborde's counsel objected to the court reviewing the records "without our being able to see it" the court immediately denied Laborde's motion as "untimely." (R.T. 16).

The Court of Appeals' final opinion (Appendix B, p. 14) gives an abbreviated description of the foregoing. Its statement that "Laborde . . . gave no reason for the delay" [in making the motion] is factually incorrect. The foregoing evidence shows the reason for the delay which was presented to the trial court.

The Court of Appeals' holding that it was not an abuse of discretion for the district judge to deny Laborde's motion as "untimely" (Appendix B, p. 14) is erroneous. The cause of the delay was reasonable. The University made no claim

it had been prejudiced by the delay. The records were in court. They could have been handed over immediately.

The tremendous importance of a Title VII plaintiff having access to the University's evaluations so that the objectives of Title VII may not be thwarted, confirm that the Court of Appeals erred in upholding the trial court's denial, as "untimely," Laborde's motion to inspect the University's records which *were in the courtroom when the motion was heard.*

Summary.

The Court of Appeals concedes that Laborde proved a *prima facie* case. (Appendix B, pp. 10-11). The 7 to 1 majority of the outside scholars which recommended that Laborde be promoted to full professor (pp. 3-4, *supra*) provides ample evidence that competent disinterested scholars considered her qualified for such promotion. The reasons why the Chancellor, the person who makes the final decision as to promotion, refused Laborde promotion every time since 1974 are not in evidence.

The foregoing demonstrates that Laborde overwhelmingly established that the University's failures to promote her to full professor, commencing in 1974, were due to sex discrimination.

This case, however, involves far more than Laborde's interests. The Court of Appeals' decision, if allowed to stand, can seriously weaken the enforcement of Title VII. It would be a precedent that (a) an employer *can* rebut a *prima facie* case without introducing evidence of the reasons for his actions; (b) proof by a preponderance of the evidence in *not* sufficient to enable a Title VII plaintiff to prove "pretext"; (c) it *is* proper for a district court to give "deference" to the employer's stated reason and (d) a district court *can* refuse to grant the Title VII plaintiff access to the

records on which the University claims it based its "non-discriminatory" reason.

It is of great public importance that the enforcement of Title VII *not* be weakened. For example, the members of the United States Commission on Civil Rights, in commenting, last month, on the Commission's study: "Unemployment and Underemployment Among Blacks, Hispanics and Women," which covered the years 1971 through 1980, concluded with the following, single recommendation, without dissent:

> ". . . . we must try to end discrimination directly by enforcing the law. The groups involved must not be shortchanged by finding their paths to employment opportunities blocked even when they have acquired education and skills."[5]

Because of the many petitions for certiorari which come before the Court, the undersigned respectfully suggest that this case may be suitable for a *per curiam* reversal citing *McDonnell Douglas*, *Burdine* and *Jepsen*, and the four questions presented herein.

Conclusion.

The petition should be granted with respect to the four questions presented.

Respectfully submitted,

JOHN G. SOBIESKI,

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Counsel for Petitioner.

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[5]United States Commission on Civil Rights: "Unemployment and Underemployment Among Blacks, Hispanics, and Women." Clearinghouse Publication No. 74. November 1982, p. 59.